87-1838

No. .....

Supreme Court, U.S.
FILED
MAY 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

—o—

JUAN MEDRANO, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED

Whether the Federal larceny statute, 18 U.S.C. § 641, may be stretched to accomodate a factual situation wherein a Federal employee is bribed for his aid in helping aliens obtain a permanent border crossing card.

Whether the reach of the Federal larceny statute § 18 U.S.C. § 641, may be legally expanded to encompass situations wherein a Federal employee is bribed and subsequently aids the briber in obtaining a Federal contract, license, bestowal of rights, etcetera which has a value of more than $100.00 to the briber.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES CITED	iii
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS WHY THE WRIT SHOULD BE GRANTED	5
CONCLUSION AND PRAYER	17
APPENDIX	
08MAR88 OPINION	A1
20JAN88 OPINION	A3

TABLE OF AUTHORITIES

Page

Dowling v United States, — U.S. —, 105 S.Ct. 3127 (1985) 8

Jackson v Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979) 13, 14, 16

Ray v United States, — U.S. —, 107 S.Ct. 2093, 2093-2094 (May 18, 1987) 15

McNally v United States, — U.S. —, 107 S.Ct. at pp. 2879 ..... 10, 11, 12

U.S. v Medrano, No. 87-1342 Slip Opinion, (Jan. 20, 1988) 1, 2, 6, 7

United States v Nessanbaum, 205 F.2d 93, 98 (3rd Cir. 1953) 16

United States v Sandoval, 791 F.2d 929 (5th Cir. 1986) 15

U.S. v Sayklay, 542 F.2d 942 (5th Cir. 1976) 8

OTHER:

18 U.S.C. § 641 ..... *passim*

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CITATIONS TO OPINIONS BELOW

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit in *United States v Medrano*, No. 87-1342 was entered without opinion on March 8, 1988, and this *Order* is reproduced herein as Appendix Item I, pp. A1-A2. The *Opinion* of the panel of the United States

Court of Appeals for the Fifth Circuit in *United States v Medrano,* No. 87-1342 was entered on January 20, 1988 and is yet to be published. This Panel *Opinion* is reproduced herein as Appendix Item II, pp. A3-A12.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on March 8, 1988. This *Petition* is timely filed within sixty (60) days of March 8, 1988, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 641 reads in pertinent part:

§ 641. *Public money, property or records*

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof

• • •

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

June 25, 1948, c.645, 62 Stat. 725.

18 U.S.C. § 641

———o———

STATEMENT OF THE CASE

1. Procedural History of the Case:

This case was essentially a bribery case under 18 U.S.C. § 201(c) which involved collateral charges of violations of 18 U.S.C. § 641. The Petitioner was charged in his indictment with thirteen (13) felony counts of violating 18 U.S.C. § 641; was convicted of violating some twelve (12) counts, and was sentenced to a felony penalty, two years, to be served concurrently on each of those counts. These convictions were affirmed as to all but one count by a panel of the U.S. Court of Appeals for the Fifth Circuit in *U.S. v Madrano,* No. 87-1342, *Slip Opinion,* (Jan. 20, 1988).

2. The Border Crossing Card:

This is essentially a bribery case. The Government attempted to prove at trial that JUAN MEDRANO, Appellant herein, was an immigration inspector at the Paso Del Norte Bridge, El Paso, Texas, who accepted bribes of approximately $50.00 a person to aid Mexican aliens in obtaining a permanent crossing card. Before proceeding further, it would be helpful to at least attempt to identify

what was the "thing of value over $100.00" which the Petitioner is accused in the indictment of selling, conveying, disposing of, etcetra. First of all, we must contemplate the blank I-190 forms which were admittedly provided to alleged co-conspirators PALOMINO and AGUILAR among others. This cannot be the "border crossing card" specified in the Trial Court's charge, *(RVII 398-399)*, and specified in the last thirteen indictment counts, *(RI 162-166)*. First of all, the card was returned to Immigration. Second, in its blank form it was considered an application not a "border crossing card." Third, there was no evidence that the blank application had any value at all much less over $100.00. Actually it was distributed to the public free upon request. Thus, there is no question that the blank I-190 was not and cannot be considered the "border crossing card" specified in the indictment and in the charge. The second candidate for the "border crossing card" is the last page of the I-190 which when signed and stamped by the approving Immigrations officer, which is called a temporary border crossing card or "temp" which expires after ninety (90) days. However, the testimony of the various individuals who allegedly paid middlemen who allegedly paid the Petitioner was that they were seeking official aid in obtaining a *"permanent border card"* which is issued after ninety (90) days if the Immigration superiors concur in the Inspector's judgment after investigation and review of the records. This was what the bribers were paying for the Petitioner's aid in obtaining. Indeed, there was no testimony as to the value or "sales price" of the paper temporary card which is the only card that the Petitioner had the authority to issue and the only card he did in fact issue. Thus we are left with the plastic-laminated, per-

manent "border crossing card" as the only real candidate for the "alien border crossing card" specified in the indictment. Of course, the problem with this card would be that it was not issued by the Petitioner nor was he authorized to issue it or capable of actually issuing it. An additional problem is that if the Petitioner's aid in securing the card can be twisted to conform to the Federal larceny statute, then how can the fact that his aid was uniformly rewarded at $50.00 a card be utilized to meet the $100.00 plus requirement.

———o———

REASONS WHY THE WRIT SHOULD BE GRANTED

The Federal larceny statute, 18 U.S.C. § 641, may not be stretched to accommodate a factual situation wherein a Federal employee is bribed for his aid in helping aliens obtain a permanent border crossing card.

The reach of the Federal larceny statute 18 U.S.C. § 641, may not be legally expanded to encompass situations wherein a Federal employee is bribed and subsequently aids the briber in obtaining a Federal contract, license, bestowal of rights, etcetera, which has a value of more than $100.00 to the briber.

A. The Decision of the Fifth Circuit Panel.

A panel of the United States Court of Appeals for the Fifth Circuit held that 18 U.S.C. § 641 could be stretched to fit the facts of this case. That panel found the facts to be as follows:

> The application for the card is a three-part document, containing the original and two copies. If approved, the original of the application is used to gen-

erate a permanent Border Crossing Card, a laminated card about the size of a driver's license; the second sheet is kept as a record by the Immigration Service; and the third sheet is given to the applicant to use as a temporary card.

The application must be completed and presented personally by the applicant at a port of entry into the United States. When the applicant appears at the port of entry, he or she delivers the application to the receptionist who checks its completeness and stamps it with the date and time. The applicant is then directed to the seating area to wait until his or her name is called. Applications are handled on a first come, first served basis. Before the application is processed a check is made to learn if the Immigration Service has an unfavorable record on the individual. If one is found to exist, the record is ordered and the applicant is told to return later.

* * *

Upon approval by an Immigration Service supervisor, the permanent laminated Border Crossing Card *virtually* always issues 90 days after the issuance of the temporary Border Crossing Card. The supervisors merely duplicate the computer check. Thus, the issuance of the temporary card by Medrano *virtually* assured issuance of a permanent card. For each application Medrano approved he received $50 in a brown paper bag from the cab drivers. Although Medrano's cut was only $50, each customer paid over $100 for the entire transaction, except in one case Count 15) in which the customer paid less. (emphasis supplied)

U.S. v. Medrano, No. 87-1342 Slip Opinion (Jan. 20, 1988) at p. 2-4

The U.S. Court of Appeals for the Fifth Circuit made the following legal holding:

> Medrano argues that the "card" at issue is the permanent Border Crossing Card, which he had no authority to issue and that his approval of an application for a temporary cards (sic) could not be construed as "selling, conveying, or disposing." The evidence establishes that a temporary card provides the bearer with the same rights as a permanent card, and that Medrano's approval of the application for the temporary card *virtually* assured the applicant of obtaining a permanent card.
>
> Although Border Crossing Cards are issued free of charge, Medrano was, for a fee, approving the applications of people who, for various reasons, were not qualified. By furnishing the applicant with the temporary Border Crossing Card, Medrano was essentially selling a package deal, and facilitating the acquisition of a permanent Boarder Crossing Card. Because of this Court's holding that the government need not prove actual property loss under § 641, *United States v. Barnes*, 761 F.2d 1026 (5th Cir. 1985), Medrano's activity constitutes "selling, conveying, or disposing," under the statute. He was not merely providing a service; he was selling the actual card. (emphasis supplied)

U.S. v. Medrano, No. 87-1342 Slip Opinion (Jan. 20, 1988) at p. 8

B. The Federal Larceny Statute, 18 U.S.C. § 641 Cannot Be Tortured to Fit the Circumstances of This Case.

This is a bribery case. This is not a larceny case. An assistant United States Attorney for the Western District of Texas attempted in a misguided fashion to be creative by indicting this Petitioner with a bribery count and a larceny count as to each specific occurrence. Now a panel of the Fifth Circuit Court of Appeals has ratified this unfortunate action without real consideration as to the conse-

quences of its decision. First of all penal laws, even Federal penal laws, are strictly construed, *U.S. v. Sayklay,* 542 F.2d 942 (5th Cir. 1976). Penal statutes are not pieces of maleable plastic to be stretched in every direction to snare the guilty or the unwary. The panel in reaching its decision did not cite a single Federal prosecution where this expanded version of the Federal larceny had been utilized nor a single shred of legislative history in justification of this novel interpretation, *Dowling v. United States,* — U.S. —, 105 S.Ct. 3127 (1985).

What is involved here in a bribery offense where money was given to a Government employee for his aid in securing a "permanent Border Crossing Card" which had no intrinsic value but which conferred rights and privileges which had a monetary value to those who were doing the bribing. Four things were undisputed: (1) that the Petitioner did not have authority to issue the "permanent Border Crossing Card;" (2) that the actual "permanent Border Crossing Cards" were in fact issued by other immigration authorities after a second computer check; and (3) that these other immigration authorities had absolute discretion to issue or not issue a "permanent Border Crossing Card" but usually followed the decision of the inspector on the scene who had issued the temporary Border Crossing Card, *Medrano, Slip Opinion,* at pp. 2-4. This second computer check is especially important to this case, because there was Government testimony that the Petitioner either failed to run the computer check or ignored unfavorable results of such a check in some of the cases. So these might be the exact cases where the immigration higher-ups might reach a different decision as a

result of the second computer check. However, as much as the specifics of this case might make the Petitioner's case stronger, the general central issue is also strongly in his favor. The larceny statute has never been applied to cases where bribery has been used to cause a Government employee to aid the briber in gaining such Government license, contract, or permit which has a monetary value to the briber. A Government contract is like a "permanent Border Crossing Card" in that it conveys rights, privileges, etc. which are enforceable in Court. Indeed, a Government contract is a much more viable candidate for envelopment by the newly found plasticity of § 641 in that it results in money actually being paid by the Government to the briber as against a mere conveyance of rights and privileges which have a monetary value to the briber.

Since the facts of this case are clear and are not disputed, this is the ideal case for this Court to consider upon certiorari before embarking on this dubious departure from precedent and history. Given this Court's recent curtailment of the Federal Mail Fraud statutes on an issue similarly related to legislative intent, etc., closer consideration and enunciated justifications (if they can be found) might be in order in any case. And such consideration should be given now, before the Fifth Circuit's panel *Opinion* which is designated "[publish]" finds its way into the hands of Federal prosecutors and into grand jury rooms across the nation.

C. This Court's Decision in McNally is a guide to Analysis in this Case, and Provides a Reason Why Certiorari Should Be Granted Now.

This Court in *McNally v United States,* — U.S. —, 107 S.Ct. 2875 (1987) held that the Mail Fraud statute does not prohibit schemes to defraud the people of their intangible rights. In our case, the larceny statute is being expanded to cover situations where a Government employee is being bribed to gain his aid in achieving a status, contract, etcetera which in this case involves the intangible right of crossing into the United States. In *McNally,* this Court first stated the general law as to construing a criminal statute in this context:

> We believe that Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of such schemes. The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. United States v Bass, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971); United States v Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222, 73 S.Ct. 227, 229-230, 97 L.Ed. 260 (1952). See also Rewis v United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1060, 28 L.Ed.2d 493 (1971). As the Court said in a mail fraud case years ago, "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." Fasulo v United States, 272 U.S. 620, 629, 47 S.Ct. 200, 202, 71 L.Ed. 443 (1926). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the pro-

> tection of property rights. If Congress desires to go further, it must speak more clearly than it has.
>
> *McNally*, 107 S.Ct. at 2881

Second, the Court in McNally dealt with the factual situation of a public official misusing his office for private gain as not being the deprival of money and provision envisioned by the Mail Fraud statute (and by the larceny statute):

> The jury convicted petitioners on both the mail fraud and conspiracy counts, and the Court of Appeals affirmed the convictions. United States v Gray, 790 F.2d 1290 (CA6 1986). In affirming the substantive mail fraud conviction, the court relied on a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government. See e.g., United States v Mandel, 591 F.2d 1347 (CA4 1979), aff'd in relevant part, 602 F.2d 653 (en banc), cert. denied, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). Under these cases, a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud. Also, an individual without formal office may be held to be a public fiduciary if others rely on him "because of a special relationship in the government" and he in fact makes governmental decisions. 790 F.2d at 1296 (quoting United States v Margiotta, 688 F.2d 108, 122 (CA2 1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983). The Court of Appeals held that Hunt was such a fiduciary because he "substantially participated in governmental affairs and exercised significant, if not exclusive, control over awarding the workmen's compensation insurance contract to Wombwell and the payment of monetary kickbacks to Seton." 790 F.2d at 1296. We granted certiorari, 479 U.S. —, 107 S.Ct. 642, 93 L.Ed.2d 698 (1986), and now reverse.

> The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government. As first enacted in 1872, as part of a recodification of the postal laws, the statute contained a general proscription against using the mails to initiate correspondence in furtherance of "any scheme or artifice to defraud." The sponsor of the recodification stated, in apparent reference to the anti-fraud provision, that measures were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.
>
> *McNally*, 107 S.Ct. at pp. 2879

In our case, the history of the Federal Larceny statute is even more firmly grounded in the deprival of money or property than the Mail Fraud statute. We not only have strikingly similar fact and legal issues, but also an opportunity to avoid the retroactive application problems which this Court has and is facing in *McNally*. It is hard to justify the failure to apply a decision such as *McNally* retroactively because the decision clearly states that those convicted of mail fraud violations under *McNally* facts were being convicted of violating a statute which never applied to their conduct. On the other hand retroactive application would wreak havoc in regard to a multitude of cases. Here, we have the chance to set the law straight in this first aberration from the accepted historical application of § 641. The *Medrano* decision, soon to be published, is the first sally of the Government across the

bright line. There are no other reported decisions in any circuit which authorizes the application of § 641 to a bribery of a public official case or similar facts. This should be a compelling reason why certiorari should be granted in this particular case.

In *Jackson v Virginia,* 443 U.S. 307 (1979), Justice Stevens, writing for the Court, quoted in *In Re Winship,* 397 U.S. 358 (1970) while declaring that:

> In Winship, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S., at 364, 90 S.Ct., at 1073. * * * The standard of proof beyond a reasonable doubt, said the Court, "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S., at 363, 90 S.Ct., at 1072. At the same time by impressing upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. Id., at 372, 90 S.Ct., at 1076 (Harlan J., concurring).
>
> The constitutional standard recognized in the Winship case was expressly phrased as one that protects an accused against a conviction except on "proof beyond a reasonable doubt . . . " In subsequent cases discussing the reasonable doubt standard, we have never departed from this definition of the rule or from the Winship understanding of the central purposes it serves. See, e.g., *Ivan V. v City of New York,* 407 U.S. 203, 204, 92 S.Ct. 1951, 1952, 32 L.Ed.2d 659; *Lego v Twomey,* 404 U.S. 477, 486-487, 92 S.Ct. 619, 625-626,

> 3 L.Ed.2d 618; *Mullaney v Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508; *Patterson v New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281; *Cool v United States,* 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335. In short, Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.
>
> *Jackson,* 443 U.S. at 315-316

And in stating these principles, the Court was careful to emphasize the following salient point:

> The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence, the constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. * * * Under our system of criminal justice even a *thief* is entitled to complain that he has been unconstitutionally convicted and imprisoned as a *burglar.* (Emphasis supplied)
>
> *Jackson,* 443 U.S. at 323-324

This is precisely the point in this case. The Petitioner was convicted of larceny when he was actually guilty of taking a bribe as a public official.

As previously pointed out, the only card for which any value can be shown is the permanent border crossing card which if issued at all would be issued ninety (90) days after application by higher Immigration authorities on their own volition and judgment. The only item actually provided by the Appellant was the blank application form

which was never shown to be of any value and was provided to the public free of charge. The completed application and temporary card when approved rightfully or wrongfully by the Appellant was never valuated; however, the larger question remains if the Appellant's approval whether rightful or wrongful, within his admitted authority and discretion could ever constitute a violation of the Federal larceny statute, 18 U.S.C. § 641. The Appellant argues that one cannot lawfully contort that statute to reach our facts.

D. The Concurrent Sentence Doctrine Should Not Apply in This Case.

The Petitioner was convicted of a bribery conspiracy count which is not being challenged on appeal. In *Ray v. United States,* — U.S. —, 107 S.Ct. 2093, 2093-2094 (May 18, 1987), the Supreme Court granted certiorari to examine this Court's decision to apply the concurrent sentence doctrine in *United States v. Sandoval,* 791 F.2d 929 (5th Cir. 1986) but found that the sentences in that case were not concurrent inasmuch as a $50.00 assessment was required by 18 U.S.C. § 3013 (1982 ed. Supp. III). It would appear that such an assessment is also required in this case. However, given the possibility of delayed or denied parole because of the multiplicity of counts (twelve), it is apparent that the Appellant will suffer meaningful and harmful effects of these convictions. In addition, it is also apparent that the Supreme Court of the United States feels that a closer look at this Court's "concurrent sentence doctrine" is unwarranted.

E. The Evidence Is Insufficient To Establish That the "Border Crossing Card" was Sold, Conveyed, or Disposed Of By the Petitioner.

It is axiomatic that a reversal is required if no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). It is also axiomatic that no conviction can be had on a legal theory or method of proof which is included in the Court's charge, *United States v. Nessanbaum,* 205 F.2d 93, 98 (3rd Cir. 1953). The Court charged the jury on the elements of 18 U.S.C. as follows:

> This instruction applies to all the 641 counts: Title 18, U.S. Code, Section 641 provides in part that: "Whoever knowingly without authority, sells, conveys or disposes of any record or thing of value of the United States having a value in excess of the sum of $100 shall be guilty of an offense against the United States."
>
> There are four essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed (sic) by this law:
>
> First, that the property described in the indictment belonged to the United States.
>
> Second, that the Defendant sold, conveyed or disposed of such property.
>
> Third, that the Defendant did so knowingly and willfully without authority of the United States.
>
> And fourth, that the property had a value in excess of $100 at the time alleged.
>
> The word "value" means the face, par or market value, or cost price, either wholesale or retail, whichever is greater. (RVII 398-399)

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioner prays that this Court grant his Petition for Certiorari and thereafter reverse his conviction and sentence below, and enter a judgment of acquittal as to his twelve (12) § 641 convictions.

Respectfully submitted

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1342

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN MEDRANO, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 1/20/88, 5 Cir., 198 , — F.2d —)

(March 8, 1988)

Before WILLIAMS and HIGGINBOTHAM, Circuit Judges and BUCHMEYER*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge is regular active service on the Court having requested that the Court be polled on

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* District Judge of the Northern District of Texas, sitting by designation.

rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. Williams
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-6

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[PUBLISH]

No. 87-1342

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN MEDRANO, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(January 20, 1988)

Before WILLIAMS and HIGGINBOTHAM, Circuit Judges, and BUCHMEYER*, District Judge.

JERRE S. WILLIAMS, Circuit Judge:

This appeal is from convictions based upon the sale of alien Border Crossing Cards to applicants who otherwise would have been unable to obtain them. Defendant Juan Medrano, an immigration inspector for the United States Immigration Service in El Paso, was convicted on one count of conspiracy and thirteen counts of selling government property in violation of 18 U.S.C. § 641. He appeals his convictions arguing that the evidence was factually and legally insufficient to support the convictions, that the prosecutor's closing argument violated his rights to due process and a fair trial, and that the court improperly declared a mistrial, placing him in double jeopardy.

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* District Judge of the Northern District of Texas, sitting by designation.

We affirm all the convictions, except for Count 15 where we reverse because there is insufficient evidence of selling government property valued at more than $100.

I. Facts

Appellant Medrano's duties as an immigration inspector included working at the traffic lanes on the international bridge in El Paso inspecting incoming people and vehicles, and also approving applications for Non-resident Alien Border Crossing Cards. A Border Crossing Card permits a non-resident alien to enter the United States and remain for up to three days. An applicant is not charged for the card, which remains valid and may be used repeatedly unless it is revoked by the United States or reported lost.

The application for the card is a three-part document, containing the original and two copies. If approved, the original of the application is used to generate a permanent Border Crossing Card, a laminated card about the size of a driver's license; the second sheet is kept as a record by the Immigration Service; and the third sheet is given to the applicant to use as a temporary card.

The application must be completed and presented personally by the applicant at a port of entry into the United States. When the applicant appears at the port of entry, he or she delivers the application to the receptionist who checks its completeness and stamps it with the date and time. The applicant is then directed to the seating area to wait until his or her name is called. Applications are handled on a first come, first served basis. Before the application is processed a check is made to learn

if the Immigration Service has an unfavorable record on the individual. If one is found to exist, the record is ordered and the applicant is told to return later.

If there is no unfavorable record indicated, the application is stamped and proceeds to the next stage—the interview. An inspector obtains the name of the applicant from the application and calls him or her to the counter for an interview. The inspector reviews the data on the application, questions the applicant and checks the required supporting documentation: a a Mexican passport or "Form 13" identity document; a letter, salary vouchers, or other documents demonstrating employment in Mexico; and, documents, such as receipts for utility payments or lease payments attesting to domicile in Mexico. If the inspector decides that the applicant is eligible to receive a Border Crossing Card, he or she signs and dates the application and stamps it with a personal admission stamp. The applicant then receives the third copy of the application to use until the receipt of a permanent card.

Medrano was convicted of divising a system with two taxi cab drives in Juarez, Mexico, under which the driver would give him a list of names of people needing Border Crossing Cards. He would give these people pre-dated stamped blank application forms. The individuals would then appear at the immigration office with the pre-stamped forms filled in. Instead of proceeding through the normal channels of several employees, the applicants would be called directly to Medrano. He would run the necessary computer check, approve the application and issue a temporary Border Crossing Card.

Upon approval by an Immigration Service supervisor, the permanent laminated Border Crossing Card virtually

always issues 90 days after the issuance of the temporary Border Crossing Card. The supervisors merely duplicate the computer check. Thus, the issuance of the temporary card by Medrano virtually assured issuance of a permanent card. For each application Medrano approved he received $50 in a brown paper bag from the cab drivers. Although Medrano's cut was only $50, each customer paid over $100 for the entire transaction, except in one case (Count 15) in which the customer paid less.

Medrano was indicted on one count of conspiracy to accept a bribe, thirteen counts of accepting bribes and thirteen counts of selling government property. His first trial ended in mistrial because the jury was deadlocked. On retrial, Medrano was convicted on one conspiracy count and the thirteen counts of selling government property; he was acquitted on the counts of accepting bribes. Medrano was sentenced to two years imprisonment on each count, each sentence running concurrently for a total of two years prison time.

II.

Medrano contends that the evidence is factually and legally insufficient to support his conviction for conspiracy and for selling government property in violation of § 641.[1] We first address the conspiracy claim.

---

[1] 18 U.S.C. § 641 (1982) reads in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority sells, conveys or disposes of any record voucher, money, or thing of value of the United States

(Continued on following page)

A. *Conspiracy*

The elements of a conspiracy charge consist of (1) an agreement between two or more persons to commit an offense and (2) the commission of an overt act by one of them in furtherance of the agreement. *United States v. Wilson,* 657 F.2d 755, 758 (5th Cir. 1981). The Government must prove that a conspiracy existed, that Medrano knew of its existence, and that, with knowledge, he voluntarily became a part of it. *United States v. Graves,* 669 F.2d 964, 969 (5th Cir. 1982). Medrano claims that the Government failed to prove the existence of an "agreement." Medrano contends that the only evidence of "agreement" presented by the Government consists of the testimony of Jose Palimino, one of the cab drivers, who stated at trial that he merely asked Medrano to help his relatives obtain Border Crossing Cards, and paid Medrano for the favor.

When a conviction is appealed for insufficient evidence, this Court must view the evidence in the light most favorable to the Government, with all inferences drawn in support of the jury's verdict. *Glasser v. U.S.,* 315 U.S. 60, 80 (1942). We must affirm the conviction if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

(Continued from previous page)

. . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100.00, he shall not be fined more than $1,000 or imprisoned not more than one year, or both.

The Government presented evidence upon which a rational trier of fact could have found, beyond a reasonable doubt, that a conspiracy existed between Medrano and the cab drivers. One of the applicants testified that she attempted to pay Medrano, but that he indicated that she should pay the taxi cab driver. Medrano accepted the lists and the payment from the cab drivers, and violated departmental rules in processing the applicants. This evidence shows a concert of action among Medrano and the cab drivers. Because proof of a conspiracy may be inferred from a concert of action, *United States v. Aguirre Aguirre,* 716 F.2d 293, 297 (5th Cir. 1983), the evidence suffices to support Medrano's conviction for conspiracy.

B. *Sale of Government Property*

Under § 641, the Government must prove the elements of the offense of sale of government property: (1) the property belonged to the United States, (2) Medrano sold, conveyed, or disposed of such property, (3) he did so willingly and knowingly without authority, and (4) the property had a value in excess of $100. Medrano claims that two of these elements are lacking. First he claims that there is insufficient evidence to establish that he "sold conveyed or disposed" of Border Crossing Cards. Medrano also argues that the evidence was insufficient to establish the value of the Border Crossing Cards as exceeding $100. We first address his claim regarding the "sale" and then his claim on valuation of the cards.

Medrano argues that the "card" at issue is the permanent Border Crossing Card, which he had no authority to issue and that his approval of an application for a

temporary card could not be construed as "selling, conveying, or disposing." The evidence establishes that a temporary card provides the bearer with the same rights as a permanent card, and that Medrano's approval of the application for the temporary card virtually assured the applicant of obtaining a permanent card.

Although Border Crossing Cards are issued free of charge, Medrano was, for a fee, approving the applications of people who, for various reasons, were not qualified. By furnishing the applicant with the temporary Border Crossing Card, Medrano was essentially selling a package deal, and facilitating the acquisition of a permanent Border Crossing Card. Because of this Court's holding that the government need not prove actual property loss under § 641, *United States v. Barnes,* 761 F.2d 1026 (5th Cir. 1985), Medrano's activity constitutes "selling, conveying, or disposing," under the statute. He was not merely providing a service; he was selling the actual card.

Medrano also argues that the evidence is insufficient to establish the value of the property sold as being in excess of $100. He reasons that although all the applicants but one paid over $100 for the entire package deal, Medrano himself only received $50. He claims that he sold, if anything, only temporary Border Crossing Cards, and that these were not worth $100. As we have already stated, Medrano was selling a package deal, not merely a temporary Border Crossing Card. The temporary card virtually assured issuance of the permanent card within 90 days. Thus, the value of the government property sold by Medrano is determined with respect to the entire trans-

action, culminating in the applicant's possession of a permanent Border Crossing Card.

As a general rule, value under § 641 is determined by "market forces—the price at which the minds of a willing buyer and seller would meet." *United States v. DiGilio*, 538 F.2d 972, 979 (3d Cir. 1976). Thus, the evidence of the price paid by the applicants, which exceeded $100 in every case but one, suffices to support a valuation consistent with § 641. Count 15, however, involves an applicant paying less than $100, and must be reversed.

III. *Double Jeopardy*

Medrano contends that in his first trial the district court improperly declared a mistrial after only twelve hours of deliberation so that his second trial was barred by the constitutional prohibition against double jeopardy.

This Court must accord great deference to a decision to declare a mistrial. *Arizona v. Washington*, 434 U.S. 497 (1978). We have previously held that retrial is not barred where a court "carefully considered the alternatives and did not act in an abrupt, erratic, or precipitate manner." *Grandberry v. Bonner*, 653 F.2d 1010, 1014 (5th Cir. 1981). The trial judge declared a mistrial in Medrano's first trial after the jury sent three notes stating that they were deadlocked. The district court received the first note that the jury was deadlocked and sent the jurors home for the night. The jury sent the second note at 3:40 p.m. the next day. The judge then polled the jury and found that seven out of twelve thought a verdict could still be reached. After a return to deliberations, the jury sent the final note stating that the deadlock

could not be broken. Under these circumstances declaring a mistrial was not improper, and the second trial was not constitutionally barred.

IV. *Prosecutorial Misconduct*

Medrano argues that his right to due process and a fair trial was violated by prosecutorial remarks referring to matters outside of the record. The statement in question occurred during the prosecutor's closing argument:

> Secondly, ladies and gentlemen, when the agents interview the witnesses in these cases they make detailed reports of the interviews that they conduct during the time at the initial contact with the witnesses. And all of those have been turned over to Defense counsel in this particular case.
>
> MR. ISLAS: Your Honor, I would object. That's not in evidence. That's outside of the evidence.
>
> THE COURT: Let's go on to something else.

Medrano argues that the failure of the district judge to make a formal ruling sustaining the objection left the matter to the jury and suggested additional evidence which was indicative of guilt.

The test for determining whether there was prosecutorial misconduct is "whether a prosecutor's remarks were improper and if so whether they prejudicially affected the substantial rights of the defendant." *United States v. Shakelford*, 709 F.2d 911, 913 (5th Cir. 1983). A remark is not improper if made in direct response to a statement by defense counsel. *United States v. Brooks*, 786 F.2d 638 (5th Cir. 1986). We find that the prosecutor's remarks were made in direct response to defense

counsel's closing remarks, which assailed the credibility of the prosecution's witnesses.[2] The prosecutor's remarks implied that defense counsel could have used the reports to impeach witnesses if their statements were inconsistent. We find that the prosecutor's remarks did not affect a "substantial right" of Medrano, and there was no error.

We affirm the conviction of Medrano for one count of conspiracy and eleven counts of selling government records.[3] We reverse the conviction under Count 15 for insufficient evidence.

AFFIRMED, EXCEPT FOR ACQUITTAL ON ONE COUNT.

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[2] In closing, defense counsel made several statements regarding the alien applicants who testified: "they're going to use deception, deceit and lies in order to obtain entry into the United States," and "she's an old pro at lying . . . ," and "she was most of the time lying or trying to satisfy what the Government wanted her to say."

[3] The Government dropped Count 24.

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No. 87-1838

In the Supreme Court of the United States

OCTOBER TERM, 1988

JUAN MEDRANO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted under 18 U.S.C. 641 for selling government records or property.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Chappell v. *United States*, 270 F.2d 274 (9th Cir. 1959) . . 7
McNally v. *United States*, No. 86-234 (June 24, 1987) 5
Morissette v. *United States*, 342 U.S. 246 (1952) 5-6
United States v. *Bigelow*, 728 F.2d 412 (9th Cir.), cert. denied, 469 U.S. 868 (1984) 7, 8
United States v. *Croft*, 750 F.2d 1354 (7th Cir. 1984) 6
United States v. *Devall*, 462 F.2d 137 (5th Cir. 1972) 8
United States v. *DiGilio*, 538 F.2d 972 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977) 6, 8
United States v. *Girard*, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979) 6
United States v. *Jeter*, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) 6
United States v. *Tobias*, 836 F.2d 449 (9th Cir. 1987), cert. denied, No. 87-6545 (Apr. 4, 1988) 7

Statutes:

18 U.S.C. 201(c)(1) 2
18 U.S.C. 371 1
18 U.S.C. 641 . . . . . 1-2, 3-4, 5, 6, 7, 8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A12) is reported at 836 F.2d 861.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1988. A petition for rehearing was denied on March 8, 1988 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on May 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to accept a bribe, in violation of 18 U.S.C. 371, and 13 counts of selling or conveying government records or property, in violation of 18 U.S.C.

641.[1] He was sentenced to concurrent two-year prison terms on each count. The court of appeals affirmed on all but one substantive count, as to which it found the government's evidence insufficient (Pet. App. A3-A12).

1. The evidence at trial showed that petitioner was employed as an immigration inspector for the Immigration and Naturalization Service (INS) in El Paso, Texas. His duties included inspecting incoming travelers and vehicles at the international bridge in El Paso, as well as approving applications for border crossing cards. Such cards enable nonresident aliens to enter the United States and remain for up to three days. An applicant is not charged for the card, which remains valid and may be used repeatedly until it is revoked by the United States or is reported lost. Pet. App. A3, A4.

The application for a border crossing card is a three-part document that contains the original and two copies. If approved, the original is used to make a permanent laminated card about the size of a driver's license. The second sheet is maintained by the INS for its records, and the third sheet is given to the applicant to use as a temporary card. Pet. App. A4.

An applicant for a card must appear in person at the port of entry into the United States to complete and present his application. When the applicant appears at the port of entry, he delivers the application to the receptionist, who checks it for completeness and stamps it with the date and time. The applicant is then directed to the seating area until his name is called. Applications are handled on a first-come, first-served basis. Before the application is processed, a check is made to learn if the INS has an unfavorable record on the applicant. If such a

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[1] Petitioner was acquitted on 13 counts of accepting bribes, in violation of 18 U.S.C. 201(c)(1).

record is found, consideration of the application is postponed pending a further investigation. Pet. App. A4-A5.

If no unfavorable record is located, the applicant is interviewed. The inspector reviews the data on the application, questions the applicant, and verifies the required supporting documentation establishing Mexican citizenship, employment, and domicile. Once the inspector determines that a card should be issued, he signs and dates the application and stamps it with his personal stamp. The applicant is then given the third copy of the application to use until he receives his permanent card. Pet. App. A5.

2. Petitioner was convicted of devising a system with two taxicab drivers from Juarez, Mexico, under which the drivers provided him with lists of individuals seeking border crossing cards. Under the scheme, petitioner would tell the drivers when to have these "customers" appear at the INS office for processing, and he would provide predated stamped blank application forms for them. The customers would then appear at the INS office with completed forms. Instead of proceeding through the normal channels of several employees, the customers would be called directly to petitioner. Petitioner would run the necessary computer check, approve the application, and issue a temporary border crossing card. The issuance of a temporary card by petitioner virtually guaranteed the issuance of a permanent card, since petitioner's supervisor merely duplicated the computer check before issuing a permanent card. Petitioner received $50 for each application he approved, although each customer paid more than $100 for the entire transaction. Pet. App. A5-A6.

3. On appeal, petitioner argued that the government failed to prove that he had violated 18 U.S.C. 641.[2] First,

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[2] Section 641 is violated by anyone who "without authority, sells, conveys or disposes of any record * * * or thing of value of the United

he claimed that there was insufficient evidence to establish that he "sold, conveyed or disposed" of a "record * * * or thing of value" within the meaning of Section 641. Second, petitioner asserted that the evidence was insufficient to establish that the value of each of the cards exceeded $100. Pet. App. A8-A9.

The court of appeals rejected both contentions (Pet. App. A8-A10). With respect to petitioner's first claim, the court reasoned that "a temporary card provides the bearer with the same rights as a permanent card," and that petitioner's "approval of the application for the temporary card virtually assured the applicant of obtaining a permanent card" (*id.* at A9). The court pointed out that petitioner accepted fees to approve applications of people who, for various reasons, were not qualified to receive a border crossing card (*ibid.*). Moreover, the court noted, petitioner was "not merely providing a service" but instead was "selling the actual card" (*ibid.*).

In rejecting petitioner's second argument, the court found that, as to all but one count, the evidence was sufficient to establish that the price paid by the customers was in excess of $100. Although petitioner personally received only $50 per customer, the court held that "the value of the government property sold by [petitioner] is determined with respect to the entire transaction, culminating in the applicant's possession of a permanent Border Crossing Card" (Pet. App. A9-A10). The court found that, as deter-

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States or of any department or agency thereof * * *." Under that section, a violator "[s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." Thus, to convict a person of a felony under Section 641, the value of the property must exceed $100. The statute defines "value" as "face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

mined by " 'market forces—the price at which the minds of a willing buyer and seller would meet,' " the evidence established that the value of the border crossing cards exceeded $100 (*id.* at A10 (citation omitted)).[3]

ARGUMENT

Petitioner renews his contentions that (1) he did not sell, convey, or dispose of government property and (2) the border crossing cards were not worth more than $100 (Pet. 7-16). Those factbound contentions lack merit and do not warrant review by this Court.

1. Petitioner contends (Pet. 10) that Section 641 does not apply to the sale of the "intangible right of crossing into the United States." Relying on *McNally* v. *United States*, No. 86-234 (June 24, 1987), he argues (Pet. 10-12) that Section 641 should be limited to cases where the government has been deprived of "money or property." Petitioner, however, fails to take into account the broad language of Section 641, which expressly prohibits the sale of any government "record * * * or thing of value." A temporary border crossing card is both a "record" and a "thing of value" and thus falls within the broad statutory language.

The case law supports the court of appeals' construction of the statute. This Court has recognized that "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Morissette* v. *United States*, 342 U.S.

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[3] With respect to one count, the court of appeals found the evidence insufficient to establish that more than $100 had changed hands (Pet. App. A6).

246, 269 n.28 (1952). Following that interpretation, the courts of appeals have repeatedly upheld larceny convictions under Section 641 for the sale of government documents or records. See, *e.g., United States* v. *Jeter,* 775 F.2d 670, 679-682 (6th Cir. 1985) (upholding Section 641 conviction of a defendant who had illegally obtained and distributed imprinted carbon sheets used in the typing of secret grand jury documents and proceedings; the court noted that "Congress' very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities."), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Girard,* 601 F.2d 69, 70-71 (2d Cir.) (upholding conviction of a former DEA agent who obtained and distributed confidential records; the court stated that "[a]lthough the content of a writing is intangible, it is nonetheless a thing of value"), cert. denied, 444 U.S. 871 (1979); *United States* v. *DiGilio,* 538 F.2d 972, 976-978 (3d Cir. 1976) (affirming Section 641 conviction of a defendant who obtained confidential information and documents from FBI files), cert. denied, 429 U.S. 1038 (1977); cf. *United States* v. *Croft,* 750 F.2d 1354, 1359-1362 (7th Cir. 1984) (upholding conviction of university professor who misappropriated services of student research assistant for his own use, where the assistant was paid from government funds). Accordingly, petitioner errs in arguing that Section 641 should not apply to something that can be characterized as "intangible."

Even if the temporary border crossing card did not qualify as a "thing of value," it would still be within the reach of the statute because it constitutes a government "record" within the meaning of Section 641. See generally *DiGilio,* 538 F.2d at 977 ("[a] duplicate copy is a record

for purposes of the statute * * *"). Petitioner's convictions are thus valid under that alternative ground.[4]

There is likewise no merit to petitioner's contention (Pet. 8-9, 14-15) that the issuance of temporary cards for a fee is not a violation of Section 641 because such cards do not necessarily ensure the subsequent issuance of permanent cards by higher authorities within the INS. As the court of appeals noted, the permanent card "virtually always issues 90 days after the issuance of the temporary Border Crossing Card" (Pet. App. A5-A6). The only remaining hurdle is another computer check (*id.* at A6). And petitioner testified that he personally checked the computer information on each of the special applications he processed, making certain that his approvals would stand (Gov't C.A. Br. 13). The value of the temporary cards to petitioner's customers was therefore equivalent to the value of the permanent cards they were assured of receiving.

2. Petitioner also claims (Pet. 4-5) that the evidence failed to establish that the documents he sold had a value in excess of $100. In fact, with the exception of the one count that was reversed by the court of appeals, the

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[4] Contrary to several other circuits, the Ninth Circuit has indicated that Section 641 does not apply to "intangible goods," such as "classified information." *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir. 1987), cert. denied, No. 87-6545 (Apr. 4, 1988); *Chappell* v. *United States*, 270 F.2d 274, 278 (9th Cir. 1959). The conflict among the circuits on that point is not material to the disposition of this case, however, because even in the Ninth Circuit, the border crossing cards at issue in this case would qualify as tangible property falling within the scope of Section 641. See *Tobias*, 836 F.2d at 451-452 (upholding conviction involving cards used to code and decode top secret messages); *United States* v. *Bigelow*, 728 F.2d 412, 413 (9th Cir.) (upholding conviction involving stolen credential of IRS agent), cert. denied, 469 U.S. 868 (1984). Moreover, as we have noted, even if they are not "thing[s] of value," the border crossing cards constitute government records under Section 641.

evidence plainly showed that all of the applicants paid more than $100 for their border crossing cards (see Pet. App. A10).[5] As the court of appeals noted (*id.* at A9-A10), it is irrelevant that petitioner received only a $50 share for each transaction. The value of the property under Section 641 must be determined with reference to its market price, not with reference to the profit from the sale received by a particular defendant.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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EDWARD S.G. DENNIS, JR.
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JULY 1988

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[5] Since the documents had no face value and no value in a legitimate market, the value of the property in an illegal market is determinative. See, *e.g.*, *United States* v. *Bigelow*, 728 F.2d 412, 413-414 (9th Cir.), cert. denied, 469 U.S. 868 (1984); *United States* v. *Devall*, 462 F.2d 137, 143 & n.16 (5th Cir. 1972). As the court of appeals held, the illegal market value under Section 641 is " 'the price at which the minds of a willing buyer and a willing seller would meet' " (Pet. App. A10 (quoting *United States* v. *DiGilio*, 538 F.2d at 979)).

[6] Petitioner also argues (Pet. 15) that even though he received concurrent prison terms on all counts, the concurrent sentence doctrine should not apply in this case. Because petitioner's convictions on all 13 counts that the court of appeals upheld were clearly valid, the court of appeals did not rely on the concurrent sentence doctrine, nor do we.

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